Re Sarjit Singh Khaira

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG26 OF 1990
ABDUL KADIR SULAIMAN J
7 JULY 1995

Public Servants *— Dismissal — Senior accounting officer from executive and sub-professional group — Refusal to comply with transfer order issued by Sarawak State Secretary — Investigation and dismissal proceedings by Sarawak Public Services Commission — Whether State Secretary had power to transfer — Whether Public Services Commission acting without jurisdiction — Sarawak State Constitution art 36(1) — Government of Sarawak General Orders O 69 — Public Services Commission Rules 1964 r 26(2)*

Administrative Law *— Exercise of administrative powers — Dismissal from service — Failure to comply with transfer order issued by Sarawak State Secretary — Whether State Secretary had authority to issue order — Whether Public Services Commission rightfully dismissed applicant — Whether ultra vires — Sarawak State Constitution art 36(1) — Public Services Commission Rules 1964 r 26(2)*

Administrative Law *— Remedies — Certiorari — Application for other consequential remedies in another pending suit — Whether a bar to grant of certiorari — Effect of certiorari is to reinstate applicant — Whether applicant must obtain court order declaring decision void before applying for certiorari — Rules of the High Court 1980 O 53*

The applicant was a senior accounting officer serving in the Jabatan Kerja Raya ('the JKR') in Kuching . By a letter dated 28 April 1987 ('the transfer order'), the State Secretary of Sarawak had directed the applicant to proceed on transfer to the Treasury Department at Limbang, within two weeks from the date of the letter. The applicant appealed to the State Secretary against the decision but his appeal was refused. He made a second appeal, but received no reply. The applicant decided to stay put in JKR, Kuching and the State Secretary reported this to the Sarawak Public Services Commission ('the PSC'). The PSC subsequently appointed a committee to inquire into the conduct of the applicant, pursuant to r 26(2) of the Public Services Commission Rules 1964 ('the Rules'). After considering the committee's report, the PSC decided that the applicant's misconduct was serious enough to warrant his dismissal from the civil service, pursuant to O 69 of the Government of Sarawak General Orders ('the General Orders'), and ordered his dismissal effective from 1 January 1989 ('the dismissal order'). Dissatisfied, the applicant applied for an order of certiorari to quash the dismissal order on the ground, inter alia, that the PSC had proceeded against him without jurisdiction. On the other hand, it was argued on behalf of the PSC, inter alia, that the court ought not to grant the certiorari because: (i) the applicant had two pending suits for damages against the Sarawak State Government and the PSC, and should be left to

A pursue that remedy (ii) the effect of the grant of certiorari would be to reinstate the applicant; and (iii) the transfer order had not been declared invalid by the court.

Held, allowing the application:

B (1) Order 40(1)(a) of the General Orders appears to give the State Secretary the power to transfer only administrative officers, administrative service and general clerical service officers from one department to another and not the applicant, who was a senior accounting officer from the executive and sub-professional group.

C (2) The only way for the State Secretary to lawfully transfer the applicant was by way of a written direction by the PSC delegating such power to him. This was because pursuant to art 36(1) of the Constitution of the State of Sarawak ('the Constitution'), the original power to transfer public officers was vested in the PSC. D Without this express delegated power, the transfer order by the State Secretary could not be a lawful order. It was irrelevant that the PSC agreed with the decision made by the State Secretary subsequent to the issue of transfer order.

(3) The power to exercise disciplinary control over members of the E public service of the state was with the PSC pursuant to art 36(1) of the Constitution. However, if the transfer order was not lawful, then clearly the PSC was acting outside its jurisdiction in dismissing the applicant. It follows that the applicant's failure to comply with it would not attract the provisions of O 69 of the General Orders upon which the dismissal order was based.

F (4) Although the PSC attempted to delegate its power to the State Secretary to transfer the applicant on behalf of the PSC through an instrument of delegation which was stated to have retrospective effect, the instrument was dated after the date of the transfer order. The instrument could not have retrospective effect as this G would affect the applicant's substantive rights and hence, it could not ratify the unlawful transfer order.

(5) Under r 26(1)(b) of the Rules, the PSC was required to arrange for a preliminary investigation before framing any charge against the applicant. However, as the PSC did not satisfy itself that the H transfer order was lawful before embarking with the dismissal proceedings, the PSC was acting ultra vires and without jurisdiction.

(6) Under O 53 of the Rules of the High Court 1980, the court could only grant the order of certiorari to the applicant, and not I consequential reliefs such as damages or declaration unlike O 53 of the English Rules of the Supreme Court 1965. Therefore, it was open to the applicant in this case to pursue for other consequential remedies in the two pending suits.

(7) Furthermore, although the effect of certiorari would be to reinstate the applicant, there was no authority to show that this is a ground for refusing the grant of certiorari. A

(8) It was not a prerequisite for the applicant to have obtained a court order that the transfer order was invalid before he could bring this application for certiorari. B

[Bahasa Malaysia summary

Pemohon merupakan seorang pegawai kanan perakaunan yang berkhidmat di Jabatan Kerja Raya ('JKR') di Kuching. Melalui suatu surat bertarikh 28 April 1987 ('perintah pertukaran'), Setiausaha Negeri Sarawak telah mengarahkan supaya pemohon bertukar ke Bahagian Perbendaharaan di Limbang, dalam tempoh masa dua minggu dari tarikh surat tersebut. Pemohon telah merayu kepada Setiausaha Negeri terhadap keputusan itu tetapi rayuan beliau telahpun ditolak. Beliau membuat rayuan keduanya, tetapi tidak menerima apa-apa jawapan. Walau bagaimanapun, pemohon memutuskan untuk terus bekerja di JKR, Kuching dan Setiausaha Negeri telah melaporkannya kepada Suruhanjaya Perkhidmatan Awam Sarawak ('SPA'). SPA kemudiannya telah melantik suatu jawatankuasa untuk menyiasat kelakuan pemohon, mengikut k 26(2) Kaedah-Kaedah Suruhanjaya Perkhidmatan Awam ('Kaedah itu'). Selepas mempertimbangkan laporan jawatankuasa itu, SPA pun memutuskan bahawa salah laku pemohon adalah cukup serius untuk menjustifikasikan pemecatan pemohon daripada perkhidmatan awam, menurut Perintah 69 Perintah-Perintah Am Kerajaan Sarawak ('Perintah Am'), dan memerintahkan pemecatan beliau berkuatkuasa dari 1 Januari 1989 ('perintah pemecatan'). Pemohon tidak berpuas hati lalu memohon untuk suatu perintah certiorari untuk membatalkan perintah pemecatan tersebut, atas alasan, antara lain, bahawa SPA telah mengambil tindakan terhadap beliau tanpa bidang kuasa. Sebaliknya, adalah dihujahkan bagi pihak SPA, antara lain, bahawa mahkamah tidak harus membenarkan certiorari kerana: (i) pemohon mempunyai dua guaman untuk ganti rugi yang belum selesai terhadap Kerajaan Negeri Sarawak dan SPA, dan oleh itu, beliau harus dibiarkan untuk meneruskan remedi tersebut (ii) kesan pemberian certiorari adalah untuk mengembalikan semula pemohon ke jawatannya; dan (iii) perintah pertukaran itu tidak diisytiharkan sebagai tidak sah oleh mahkamah. C D E F G H

Diputuskan, membenarkan permohonan itu:

(1) Perintah 40(1) Perintah Am nampaknya telah memberikan Setiausaha Negeri kuasa untuk menukarkan hanya pegawai pentadbiran, pegawai Perkhidmatan Pentadbiran Sarawak dan pegawai Perkhidmatan Perkeranian Am dari suatu bahagian kepada bahagian yang lain, dan bukannya pemohon, yang merupakan seorang pegawai kanan perakaunan dari kumpulan eksekutif dan sub-profesional. I

A (2) Cara tunggal supaya Setiausaha Negeri dapat memindahkan pemohon secara sah ialah melalui suatu arahan bertulis oleh SPA yang mewakilkan kuasa yang berkenaan kepadanya. Ini adalah kerana menurut fasal 36(1) Perlembagaan Negeri Sarawak ('Perlembagaan'), kuasa asal untuk menukar pegawai awam terletak pada SPA. Tanpa kuasa perwakilan secara nyata ini, perintah pertukaran oleh Setiausaha Negeri itu tidak boleh menjadi suatu perintah yang sah. Adalah tidak relevan bahawa SPA telah bersetuju dengan keputusan yang telah dibuat oleh Setiausaha Negeri selepas pengeluaran perintah pertukaran itu.

C (3) Kuasa untuk menjalankan kawalan tatatertib terhadap ahli-ahli perkhidmatan awam negeri adalah terletak pada SPA mengikut fasal 36(1) Perlembagaan. Walau bagaimanapun, jika perintah pertukaran itu tidak sah, adalah jelas bahawa SPA bertindak di luar bidang kuasanya dalam pemecatan pemohon. Ekoran itu, kegagalan pemohon untuk mematuhinya tidak akan menarik peruntukan Perintah 69 Perintah Am yang mana perintah pemecatan itu dilandaskan.

(4) Walaupun SPA cuba mewakilkan kuasanya kepada Setiausaha Negeri untuk menukarkan pemohon bagai pihak SPA melalui suatu suratcara perwakilan yang dinyatakan mempunyai kesan retrospektif, suratcara tersebut telah ditarikhkan selepas tarikh perintah pertukaran. Suratcara itu tidak boleh diberikan kesan retrospektif kerana ini akan menjejaskan hak substantif pemohon, jadi, ia tidak boleh meratifikasikan perintah pertukaran yang tidak sah itu.

F (5) Di bawah kaedah 26(1)(b) Kaedah itu, SPA dikehendaki mengaturkan penyiasatan awal sebelum membuat sebarang pertuduhan terhadap pemohon. Walau bagaimanapun, oleh kerana SPA tidak memuaskan dirinya bahawa perintah pertukaran itu adalah sah sebelum memulakan prosiding pemecatan tersebut, SPA telah bertindak secara ultra vires dan tanpa bidang kuasa.

G (6) Di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah hanya boleh memberikan perintah certiorari kepada pemohon, dan bukan relief berbangkit seperti ganti rugi atau deklarasi tidak seperti A 53 Rules of the Supreme Court 1965 di England. Maka, adalah terbuka bagi pemohon di dalam kes ini untuk mendapatkan remedi berbangkit yang lain di dalam dua guaman yang belum selesai lagi tersebut.

(7) Lebih-lebih lagi, walaupun kesan certiorari itu adalah untuk mengembalikan pemohon ke jawatannya, tidak ada autoriti yang menunjukkan bahawa ini adalah satu alasan untuk tidak memberikan certiorari.

I (8) Tidak menjadi suatu prasyarat bahawa pemohon mesti mendapat suatu perintah mahkamah bahawa perintah pertukaran itu adalah tidak sah sebelum beliau boleh membawa permohonan ini untuk certiorari.]

[*Editorial Note*: The Public Services Commission has filed an application for leave to appeal to the Court of Appeal vide Application No Q–08–399–95.]

Notes

For cases on dismissals of public servants, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 17; 10 *Mallal's Digest* (4th Ed) paras 1324–1359; [1992] Mallal's Digest 1441–1442; [1993] Mallal's Digest 1133.

For cases on orders of certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

Cases referred to

Aria Kumar & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor [1994] 3 AMR 49:2572 (distd)

Chief Constable of North Wales v Evans [1982] 3 All ER 141; [1982] 1 WLR 1155 (distd)

Doe d Rochester (Bp) v Bridge (1831) 109 ER 1001 (folld)

Ferguson v Kinnoull (Earl) (1842) 9 Cl & Fin 251 (refd)

Francis v Municipal Councillors of Kuala Lumpur [1962] MLJ 407 (distd)

Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128; [1974] 3 WLR 104 (distd)

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 All ER 1124; [1982] 3 WLR 1096 (folld)

Pengarah Pelajaran, Wilayah Persekutuan & Ors v Looi Ting Yee [1982] 1 MLJ 68 (distd)

Public Service Tribunal Judgment (Case No 57 of 1980) (unreported) (refd)

Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 MLJ 251 (refd)

Legislation referred to

Federal Constitution art 144(1), (7)

Rules of the High Court 1980 O 53

Sarawak State Constitution arts 36, 37

Public Services Commission Rules 1964 rr 2, 7, 15, 26(1)(b), (2)

Government of Sarawak General Orders O 4, O 39, O 40(1)(a), O 69

Rules of the Supreme Court 1965 O 53 [Eng]

TO Thomas (*Thomas & Co*) for the applicant.

JC Fong (State Attorney General) (*Lim Heng Joo* with him) for the Government of Sarawak.

Frank Tang (*Paul Tang* with him) (*Tang & Partners*) for the Public Services Commission.

Cur Adv Vult

A **Abdul Kadir Sulaiman J**: This is an application by the applicant for an order of certiorari to quash the decision made by the Sarawak Public Services Commission ('the PSC') on 14 December 1988, whereby he was ordered to be dismissed from the state service as an accounting officer with effect from 1 January 1989. The said order of the PSC flows from the report of the committee appointed by the PSC purportedly pursuant to r 26(2) of the Public Services Commission Rules 1964 ('the Rules') to inquire into the disciplinary conduct of the applicant. The disciplinary conduct of the applicant came into question when the PSC received a report from the State Secretary of Sarawak ('the State Secretary') that the applicant had refused to comply with the lawful orders of the government requiring him to proceed on transfer from Jabatan Kerja Raya ('the JKR'), Kuching where he was then serving, to the Treasury Department, Limbang, contrary to the provisions of O 69 of the Government of Sarawak General Orders ('the General Orders').

Prior to April 1975, the applicant was an officer of the Government of Sarawak serving in the audit department. In response to a Public Services Commission notice ('the notice'), exhibited as 'A' to the affidavit in reply of the applicant affirmed on 6 July 1991 (encl 49 in originating motion No KG26 of 1990), the applicant applied for the post of a senior accounting officer, which post was then vacant, in the JKR Simanggang, Sarawak. The post was classified in the notice to be in the executive and sub-professional group. The notice invited applications from Malaysian citizens domiciled in Sarawak, and from serving government officers. It is clear from the notice that the post was meant to fill the vacancy in the JKR. The applicant attended the interview for the said post. After the interview by the PSC, on 10 April 1975 he was offered the post as 'an appointment by transfer' to fill the post in the JKR, Simanggang, Sarawak. Exhibit A1 to the said affidavit in reply of the applicant is the offer letter. The offer came from the office of the Chief Minister signed on behalf of the State Secretary. According to exh A1, the appointment is on permanent and pensionable terms. He was required to serve a probationary period of one year with effect from the date of his appointment which would be from the date of his assumption of duties in the new post. Exhibit A1 also stipulates that in the event of his failure to secure confirmation of his appointment, action would be taken to terminate his probationary appointment. He accepted the offer, and served the JKR both in Simanggang and Kuching ever since, until he was directed by the State Secretary through the Director of JKR to be transferred to the Treasury Department in Limbang, also as a senior accounting officer by a letter dated 28 April 1987 (exh A to the applicant's affidavit affirmed on 3 September 1990 mentioned earlier), in exchange with another officer from the said Treasury Department. It is this order that the applicant is alleged to have refused to comply with which culminates in the order of the PSC dismissing him from government service.

He was instructed to proceed on transfer within two weeks from the date of the letter which expired on 12 May 1987. However, by a letter dated 29 April 1987, the applicant appealed to the State Secretary against

the decision to transfer him. The appeal letter is exhibited as 'B' to the affidavit of Tan Sri Datuk Amar Bujang, for and on behalf of the government, affirmed on 23 January 1991 in encl 15 of originating motion No KG26 of 1990. Various grounds were put in for the reconsideration of the government against the transfer. The first ground concerned his health condition. It is not in dispute that he had a heart problem and had undergone a coronary bypass which requires regular attention. The second involved the understanding had between the government and the Sarawak Government Officers' Union, as contained in the minutes of the meeting of the consultative forum held on 18 April 1984, that the Union's president of which the applicant is one, shall not be transferred away from Kuching during his tenure of office. The other grounds concerned the effect of his transfer to Limbang over his other welfare activities in Kuching. However, his appeal was turned down by the State Secretary.

On 26 May 1987, which is past the date on which the applicant ought to have proceeded on transfer, the applicant submitted another appeal for reconsideration of the government. It is exh A to the affidavit of the applicant affirmed on 28 March 1991 in encl 25 in originating motion No KG26 of 1990. In this second appeal, he contended that the decision to transfer him was ill-advised, unjust, improper and illegal. Inter alia, he challenged the validity of the said transfer order as his transfer would involve a transfer of an officer not within a department of government as the Treasury Department is an entirely separate and different department from the JKR. He also alleged that the post of a senior accounting officer is not under the common-user scheme. However, he received no reply to this second appeal from the government. All this while he did not proceed on transfer as ordered, but stayed put in JKR, Kuching.

As he failed to comply with the order to proceed on transfer, the State Secretary reported the matter to the PSC with a view to instituting disciplinary proceedings against him for having failed to comply with the said order. Following the receipt of the report from the State Secretary, the PSC purportedly in compliance with the provisions of r 26(1)(b) of the Rules issued a letter dated 7 September 1987 to the applicant, containing the charge framed against him, and he was given 21 days to submit to it a representation in writing to exculpate himself of the charge. The said letter is exh L to the affidavit of the applicant affirmed on 3 September 1990, in encl 4 in originating motion No KG16 of 1990. By a letter dated 3 October 1987, which is exh B to the affidavit of Datuk Polycarp Sim Cheng Mong for and on behalf of the government affirmed on 22 January 1991, in encl 16 in originating motion No KG26 of 1990, the applicant replied to the letter of the PSC dated 7 September 1987, denying the allegation and gave his explanation, inter alia, that the transfer order of the State Secretary and its enforcement is unjust, irregular, improper, arbitrary and/or illegal. He reiterates that the post of senior accounting officer he was appointed to is not under the common-user scheme, and therefore, any transfer ought not to be done without his consent. He alleged that the order of transfer in the circumstances, is an act of victimization for the reason of his union activities, and on account of his health conditions. He

A also informed the PSC that the action of the State Secretary to forward his matter to the PSC is premature as his second appeal to the State Secretary of 26 May 1987 remained unanswered.

Having considered his representation, and since the statement of the applicant did not contain a clear admission of the charge preferred, the B PSC purportedly in pursuance of r 26(2) of the Rules, appointed a committee to inquire into the matter which was done. The notes of proceedings before the committee is exhibited as 'C' to the affidavit of Datuk Polycarp Sim Cheng Mong affirmed on 22 January 1991, for and on behalf of the government. Having completed the inquiry, the committee submitted its report to the PSC. It is after the consideration of the report C and the result of the investigation by the committee that the PSC decided unanimously on 14 December 1988 that the applicant refused to obey the lawful order of the government, which is the transfer order issued on the direction of the State Secretary, and that the applicant's misconduct was serious enough to warrant his dismissal from the civil service, pursuant to D O 69 of the General Orders, and ordered for his dismissal effective from 1 January 1989. By a letter dated 22 December 1988, which is exh Q to the affidavit of the applicant affirmed on 3 September 1990 (encl 4 in originating motion No KG16 of 1990), the PSC informed the applicant of the decision to so dismiss him from the public service. It is against the order of the PSC that the applicant by this application now seeks the court E to quash. According to the said affidavit of Datuk Polycarp Sim Cheng Mong, at all material times, from the receipt of the report of the State Secretary until the time when the PSC made its decision on 14 December 1988, the members of the PSC were not aware of any order from any competent court declaring the said transfer order void, or unlawful, or F invalid. As such, the PSC regarded the said order as being a valid order.

It is the contention of Mr Thomas, the learned counsel for the applicant, inter alia, that both the PSC and the committee so appointed by it to inquire into the matter of the charge framed against the applicant, proceeded against the applicant without jurisdiction. This is so because G the applicant was not liable to be transferred out of the JKR to another department such as the Treasury Department, in this case, he not being in the common-user service. What this term 'common-user service' means is not clearly explained in the evidence, except that reference was made to the decision of the *Public Service Tribunal Judgment* (Case No 57 of 1980) (unreported), relating to anomalies in the salary structure of the members H of the public service on account of the implementation of the Cabinet Committee Report. In the said decision of the Tribunal at para 32, it is stated that the scheme for senior accounting officer is not a common-user scheme. Referring to the said judgment of the Tribunal, Haidar J in *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ I 251 has this to say at p 253:

> Whilst it is true that the *Public Service Tribunal Judgment* (Case No 57 of 1980) (unreported) is confined only to the issue of an anomaly within the meaning of s 2 of the Public Service Tribunal Act 1977 and the issue of

> transferability is not an anomaly, I do not see why I should not accept the opinion expressed therein that the senior accounting officers' scheme (to which the plaintiff belongs) is not a common-user.

Whatever meaning to be given to those terms, in my view, is not an issue of much importance. The central issue really is whether the State Secretary has any power at all on his own, to transfer a public officer of the state from one department of government to another as intended in this case. Order 40(1)(a) of the General Orders appears to have given him that power, but it is merely confined to administrative officers, officers of the Sarawak Administrative Service and officers of the General Clerical Service, and that power is to be exercised subject to the provisions of the Rules. From the evidence, the applicant does not belong to any one of those categories of officers. He belongs to the executive and sub-professional group. Rule 2 of the Rules defines 'transfer' to mean, inter alia, the conferment upon a person in the public service of the state of a public office in any department other than that in which he last held substantive appointment. In other words, the movement of an officer from one department of the government to another department of government. Rule 7 thereof deals with the procedure, inter alia, for the transfer of officers. There is nothing in r 7 which would suggest that the State Secretary can personally exercise his power to transfer an officer in the category of the applicant outside his department, ie from the JKR to another department. The only way then for the State Secretary to lawfully transfer the applicant in the present circumstances is by way of a written direction by the PSC delegating such power to him as required by art 36(6) of the Constitution of the State of Sarawak ('the Constitution') as the original power to transfer officers from one department of Government to another, vests with the PSC personally pursuant to art 36(1) of the Constitution. Article 36(1) of the Constitution, subject to the provisions of the Federal Constitution and of the Constitution itself, places the duty to transfer the members of the public service of the state on the PSC. This duty of the PSC, however, may by cl 6 be delegated by the PSC to any public officer, or to any board of public officers appointed by it by way of directions in writing. Therefore, for the State Secretary to validly exercise the power of transfer of the applicant from one department of the government, ie the JKR, to another department, ie the Treasury Department, it must be pursuant to the delegation of powers given by the PSC. Without this express delegation, the State Secretary, on his own, has no power to transfer a member of the public service from one department of government to another. It is irrelevant whether the PSC subsequent to the order for transfer, agrees with the decision so made by the State Secretary personally. The PSC cannot ratify the unlawful act of the State Secretary by such agreement. As Lord Tenterden CJ said in 1831 in *Doe d Rochester (Bp) v Bridge* (1831) 109 ER 1001:

> ... where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

Thus, in relation to the applicant, it is irrelevant to consider the provisions of O 40(1) of the General Orders when dealing with the issue of the purported transfer order made upon him, as his transfer would involve the movement from one department to another which, if it is to be done by the State Secretary, must be with the delegated power given to him by the PSC in accordance with art 36(6) of the Constitution. Without such express delegated power the order of the State Secretary cannot be a lawful order. In this case, the applicant was charged by the PSC to have contravened O 69 of the General Orders for failure to comply with the lawful orders of the government which is the purported transfer order issued upon him by the State Secretary. The said O 69 states:

> An officer who at any time wilfully neglects or refuses or, from illness occasioned by his own misconduct, becomes unable to obey any lawful order of the Government or is guilty of any other misconduct shall be liable to dismissal without notice.

Therefore, for the PSC to be able to resist this application of the applicant for certiorari, it must show that the purported order of the State Secretary was done upon the express delegation of power given to him by the PSC. If this is shown, then the order of the State Secretary is a lawful one, and therefore, it was rightly within the jurisdiction of the PSC to institute disciplinary action against the applicant for his refusal to comply with the said order. The power to exercise disciplinary control over members of the public service of the state is clearly with the PSC, pursuant to art 36(1) of the Constitution. However, if the said order is not lawful, then clearly the PSC is acting outside its jurisdiction in so assuming the jurisdiction resulting in the order of dismissal of the applicant. Thus, the jurisdiction of the PSC is dependent on the lawfulness or otherwise of the purported order of transfer of the State Secretary. The order of transfer as in exh A to the applicant's affidavit affirmed on 3 September 1990 mentioned earlier, is as follows:

> PWD/CSF/469( )
>
> Jabatan Kerja Raya
> Ibu Pejabat
> Wisma Saberkas
> Jalan Tun Haji Openg
> 93582 Kuching
> Sarawak.
> 28 April 1987
>
> Encik Sarjit Singh Khaira
> Through: Ag Sr Accountant
> PWD Headquarter
> Kuching.
>
> I am directed to convey the decision of the State Secretary, Sarawak that you are to be transferred to Treasury, Limbang in exchange with Encik Richard Leong Hee Cheong.

2 It has also been directed that the transfer should take effect as soon as possible. In view of this you are hereby instructed to proceed on transfer within two weeks from the date of this letter. A

3 Please arrange with the personnel section in respect of your passages and travelling arrangement without any delay.

'Hidup selalu berkhidmat' B
—Sgd—
(Kho Kwang Hui)
bp Pem. Pengarah Kerja Raya
Sarawak.

On the face of it, it would appear that the decision to transfer the applicant in this case was that of the State Secretary and not that of the PSC. But then it is contended for the respondents that the exercise of the power by the State Secretary was pursuant to the delegated power given to him by the PSC. It is in the affidavit of Hj Mazlan bin Hj Hamdan, a member of the PSC, affirmed on 5 December 1994 (encl 96 in originating motion No KG26 of 1990), that on 28 November 1989, the PSC by an instrument of delegation, delegated its power of transfer of officers in the public service to the State Secretary pursuant to art 36(6) of the Constitution. The said instrument is exhibited as C1. The instrument of delegation though dated 28 November 1989, was to operate retrospectively from 20 December 1967, a date before the date of the issue of the purported transfer order. Schedule 1 is appended to the exhibit listing out the posts in respect of which the delegation is made. Items 17 and 18 of Sch 1 are in respect of senior accounting officers of which the applicant is one. If this instrument of delegation is valid, then on the date of the order of the State Secretary, it was already in force. This instrument superseded the earlier instrument No 1/67 dated 20 December 1967, which is exh B2 to the said affidavit. In B2, the post of senior accounting officer is not listed. According to the explanation given by the deponent, in relation to the posting and transfer of officers, they are posted and transferred by the State Secretary pursuant to the General Orders and acting on powers delegated to the State Secretary by the PSC. Thus, it would appear that the State Secretary was exercising his powers of transfer not exclusively pursuant to the delegated powers given by the PSC, but also pursuant to his powers under the General Orders. Since the post of senior accounting officer is not in exh B2, it is fair to assume that when he exercised his power to transfer the applicant in April 1987 when instrument No 1/67 was in existence, he was then exercising his powers pursuant to the General Orders and not pursuant to the delegated power given to him by the PSC by the instrument as the transfer of a senior accounting officer is not within the delegated power. As the transfer involves the transfer from one department to another, clearly as stated earlier, the State Secretary has no power under the General Orders to do so on his own. Though the instrument of delegation dated 28 November 1989 was produced to show that there was a delegation of power to the State Secretary to transfer a senior accounting officer on behalf of the PSC, the instrument was dated after the date of the purported order. The retrospective effect of the instrument to a date before the

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purported order cannot validate the order which is otherwise unlawful for to do so would adversely affect the substantive right of the applicant as at the date of the order only the PSC could order such a transfer. No delegation was yet given to the State Secretary then to do so. Another aspect of the matter concerning these two instruments of delegation is that, by art 36(6) of the Constitution, the PSC may by directions in writing and subject to such conditions as it thinks fit, delegate any of its functions, which includes the function to transfer members of the public service, to any public officer, which includes the State Secretary. But art 37(3) of the Constitution requires that the discharge of the PSC's function by delegation must be done with the consent of the Yang DiPertua Negeri. However, looking at both exhs B2 and C1, there appears to be no such recital that such delegation of power given to the State Secretary was so made with the consent of the Yang DiPertua Negeri. Both arts 36 and 37 of the Constitution require that the provisions contained therein and to be subject to the provisions of the Constitution. That being the case, anything done pursuant to art 36(6) must be read in the light of the requirement of art 37(3) thereof. Therefore, if I am wrong in saying that the instrument of delegation of 28 November 1989 cannot have retrospective effect, it is still invalid on account of it being made without the consent of the Yang DiPertua Negeri as expressly required by art 37(3). In the circumstances, I am satisfied that the purported order of the State Secretary was an unlawful order made without the authority of the PSC. Failure to comply with such unlawful order will not attract O 69 of the General Orders. Therefore, there is no basis for the PSC to issue the letter to show cause to the applicant as contained in exh L. The order of dismissal of the applicant on the basis of the report of the State Secretary is therefore wrong in law. A lawful transfer order was an essential preliminary ingredient to the said disciplinary action by the PSC. If the order was unlawful, the applicant was not obliged to comply. His refusal, therefore, cannot be wilful. That be the case, the applicant had not breached any disciplinary conduct and therefore, there is no basis for the PSC to act to dismiss the applicant based on the report of the State Secretary that the applicant had refused to comply with his order of transfer. No doubt, as contended by the learned counsel for the PSC, the jurisdiction of the PSC in disciplinary matters becomes exercisable when a report from the State Secretary is received. But that would mean that the PSC could proceed to make an order for dismissal because there are various preliminary matters as prescribed by the Rules which the PSC has to consider before coming to the conclusion. Under r 26(1)(b), the PSC is required to arrange for such preliminary investigation as it may consider necessary, and if it considers that the facts, if proved, would justify the applicant's dismissal, only then will any charge be framed for the applicant to answer to exculpate himself of the charge as prima facie, the applicant had committed a breach of discipline. If however, upon such preliminary investigation, the facts, if proved, would not justify the applicant's dismissal, no charge would be framed and there was nothing for the applicant to answer to exculpate himself. The matter must rest there. To proceed on with the disciplinary

proceedings will be clearly ultra vires and without jurisdiction. It is no good for the PSC to say that since there is a report from the State Secretary, it is not for it to be concerned whether the order of the State Secretary was lawful or not and on that basis alone it could proceed with the progress of the disciplinary proceedings with a view to dismiss the applicant. Also, it is no good for the PSC to say that since the order came from the State Secretary, it is to be presumed as a valid and lawful order unless the applicant takes the first step of having the order pronounced by a court of competent jurisdiction to be unlawful. The burden is on the PSC to satisfy itself that the said order is lawful before embarking with the proceedings to dismiss the applicant. By r 15 of the Rules, all acts of misconduct by public officers are required to be reported to the PSC. The report of the State Secretary, in this particular case, must concern the alleged misconduct of the accused so as to clothe the PSC with the power to proceed with the disciplinary proceedings against the applicant. In this case, exh L dated 7 September 1987 was issued to the applicant stating that after considering all information received, the PSC was of the opinion that disciplinary action be taken against the applicant under r 26(1)(b) of the Rules on the charge that he failed to obey a lawful order of the government, contrary to O 69 of the General Orders. By that, it is taken that the PSC was satisfied based on the report and whatever preliminary investigation it had carried out, that the applicant had prima facie committed a misconduct. Indeed, it was so stated in the exhibit that after considering all information received, the PSC is of the opinion that the applicant should be liable for disciplinary action for failure to comply with the lawful order of the government issued by pemangku Pengarah Kerja Raya, which is the purported order of the State Secretary. What then are those facts which the PSC had considered, if proved, would justify the applicant's dismissal? If properly considered, the facts would reveal to the PSC that the State Secretary had issued a transfer order directing the applicant to go on transfer from one department of the government to another department of the government. This is a transfer which is the duty of the PSC under art 36(1) of the Constitution to do itself which was not done in this case. The next question to ask is, was there a delegation of power given to the State Secretary to do so on its behalf under art 36(6) of the Constitution? In the light of what has been said earlier concerning the two instruments of delegation, ie exhs C1 and B2, the PSC ought to have come to the conclusion that in this particular case the order for the transfer of the applicant by the State Secretary was done without the authority from the PSC. Instrument No 1/67 dated 20 December 1967 which is exh B2 does not cover the applicant. The PSC cannot rely on the instrument of delegation dated 28 November 1989 — exh C1 — as it was then non-existent notwithstanding its retrospective effect, about which I have touched earlier. So clearly, at that stage, the PSC ought to have declined the jurisdiction to proceed with the framing of the charge and to require the applicant to exculpate himself. It is urged upon me that the PSC is merely concerned with consideration of facts and the PSC is not competent to decide on legal matters such as whether the transfer order made by the

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A State Secretary in exercise of his delegated powers and pursuant to the General Orders is lawful or otherwise. I am afraid I cannot agree. The PSC ought to know that for any transfer to be lawful it must be done in accordance with art 36 of the Constitution, otherwise it is unlawful. If unlawful, its failure to comply would not attract the provisions of O 69 of the General Orders upon which the charge was based. The PSC cannot B presume the validity of the transfer order pursuant to O 39 of the General Orders, which states that an officer shall be liable to serve in any part of Sarawak and to discharge the duties of any post in the public service in which the State Secretary may consider it desirable to employ him, provided that such employment does not entail a loss of salary. These General C Orders according to O 4 have no force in law. In any event, the Orders cannot supersede the Constitution which by art 36 dictates the duty of the PSC as regards the transfers of officers. No doubt r 26(1)(b) of the Rules uses the word 'if proved' and therefore, at that stage after the preliminary investigation, the PSC was not concerned whether the facts would be proved or not. But, to frame a charge under the rule, the PSC must have D been satisfied of the factual ingredients collected during the preliminary investigation to form the basis for the charge of misconduct. It must have the basis to prove, and then it is for the applicant to prove otherwise. It is not a case of trying its luck affecting the fundamental right of a subject and putting the burden on the applicant to disprove simply because there is a E report submitted to it by the State Secretary. The PSC may claim that it mistook the law applicable to the facts. For that I quote the dicta of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at p 278; [1982] 3 All ER 1124 at p 1129; [1982] 3 WLR 1096 at p 1103:

> The breakthrough that the *Anisminic Ltd v Foreign Compensation Commission* F [1967] 2 All ER 986 case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being a 'determination' within the meaning G of the empowering legislation, was accordingly a nullity.

and his Lordship had this to say at [1983] 2 AC 237 at p 277; [1982] 3 All ER 1124 at p 1128; [1982] 3 WLR 1096 at p 1102 :

> The importance of *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338; [1952] 1 All ER 122 is that it re-established, H largely as a result of the historical erudition of Lord Goddard CJ, displayed in the judgment of the Divisional Court ([1951] 1 KB 711) a matter that had long been forgotten by practitioners and had been overlooked as recently as 1944 in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114, a judgment given per incuriam by a Court of Appeal of which Lord Goddard had himself been a member. What was there rediscovered was that I the High Court had power to quash by an order of certiorari a decision of any body of persons having legal authority (not derived from contract only) to determine questions affecting the rights of subjects, not only on the ground that it had acted outwith its jurisdiction but also on the ground that

it was apparent on the face of its written determination that it had made a mistake as to the applicable law. A

It is next submitted that the right of government to transfer its officers cannot be questioned even on the ground of mala fides. Two cases are cited in support. They are *Aria Kumar & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor* [1994] 3 AMR 49:2572 and *Pengarah Pelajaran, Wilayah Persekutuan & Ors v Looi Ting Yee* [1982] 1 MLJ 68. There is no dispute about the ratio in the two cases. If lawfully done, a person cannot complain over the order for his transfer. The impugned transfer in *Looi*'s case, in any event, was not in contravention of art 144(1) of the Federal Constitution as the transfer was not a transfer within art 144(7), which is in pari materia with art 36(3) of the Constitution, as he was ordered to be transferred within the same department of the government, which is not the case with the applicant here. However, the applicant before me now is challenging the action of the PSC dismissing him on the ground that there was no lawful order with which he had failed to comply, which form the basis for his disciplinary action resulting in his dismissal by the PSC. His transfer involves the transfer from one department of the government to another. If the order of the State Secretary was lawful, which I hold as unlawful for lack of proper authority, then clearly the applicant has no complaint on the issue of the jurisdiction of the PSC instituting disciplinary action against him for his failure to comply with the order to transfer him to the Treasury Department in Limbang. B C D E

It is also said that the PSC is entitled to presume the transfer order of the State Secretary to be valid unless the said order was first declared by the court in a proper proceeding that it is invalid. It is submitted that up to now there has been no final order of any court of law quashing the decision made by the State Secretary to transfer the applicant. Thus, at the time when the PSC made the decision to dismiss the applicant, the transfer order was not challenged in any court of law competent to pronounce upon the legality or lawfulness or otherwise of the transfer order. By this submission, I take it that the learned counsel is saying that the PSC had proper jurisdiction to institute disciplinary proceedings against the applicant on the ground that the order of the State Secretary was lawful unless and until pronounced otherwise by a court of competent jurisdiction. Since no pronouncement has been made so far, the applicant cannot question the validity of the order. In support, the case of *Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128; [1974] 3 WLR 104 was cited, particularly the dicta of Lord Diplock [1974] 2 All ER 1128 at p 1153; [1974] 3 WLR 104 at p 131 thus: F G H

> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes, either brought by one party to enforce the law declared by the instrument against another party, or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the I

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> instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed.

Again, the point is missed because first, the order of the State Secretary is not a statutory instrument made pursuant to an Act of Parliament. Secondly, B we are here dealing with the jurisdiction of the PSC to institute disciplinary proceedings against the applicant. The condition precedent to the jurisdiction is to be based on the existence of the basis of the allegation of misconduct on the part of the applicant. If upon proper inquiry or investigation as required by r 26(1)(b) of the Rules, there is a basis to show that the applicant had committed misconduct, then the PSC has proper C jurisdiction to frame a charge and to require the applicant to answer to exculpate himself of the charge. But in this case, as stated earlier, if a proper investigation was done instead of merely paying a lip service to the provisions of the rule, the PSC would have discovered that the State Secretary has issued the order without proper authority. The PSC was D prepared to merely go along with the State Secretary in saying that it agreed with the order even though it was issued contrary to the provisions of the Constitution. It is a sad day if in such a case the applicant cannot bring these proceedings to quash the order of the PSC simply on the ground that he had not first taken the matter of the validity of the transfer order to be adjudicated by the court. In any event, the presumption, if any, E is rebutted by the fact that there was no valid delegation of power given by the PSC to the State Secretary for the attempted transfer of the applicant from one department of government to another as required by the Constitution.

Then, it was also submitted that certiorari by its nature is a F discretionary remedy, I ought not to exercise my discretion to grant because if granted, the order of the PSC would be quashed and the applicant would remain a public officer and it would therefore amount to and have the same effect of an order of reinstatement. The learned counsel cited a passage from the case cited by the learned counsel for the applicant, G ie *Ferguson v Kinnoull (Earl)* (1842) 9 Cl & Fin 251 at p 279 suggesting that the remedy for the applicant lies only in damages. The passage states:

> Where a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so H sustained.

With all respect, I think the learned counsel has missed the point again. We are here not dealing with matter of neglect, refusal, or failure on the part of the PSC to perform its duty which it is bound to perform, thereby causing injury to the applicant. Here, the applicant is questioning the I action of the PSC dismissing him on account of an unlawful order issued by a 'usurper', as the learned counsel for the applicant puts it, which caused a detriment to him resulting in the loss of his job in the government. He wants that decision of the PSC based on the unlawful order of the State

Secretary quashed, which is a separate issue from damages, which action he may pursue elsewhere. A

In support of his contention that the court by granting the remedy of certiorari would in effect be making an order for reinstatement, Mr Fong for the government also cited the case of *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407. That case concerns an application for a declaration and not one for an order of certiorari. It was held that where there had been a purported termination of a contract of service a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the courts would not grant specific performance of a contract of service. But here the applicant is not seeking for a declaration from this court or for specific performance. He seeks to quash the decision made by the PSC upon him by way of certiorari for want of jurisdiction. Hence, the case is not at all relevant. A declaration declares the rights of a plaintiff, but in certiorari proceedings the court does not declare the rights of the applicant. If the court finds that the applicant in certiorari proceedings has made out his case, all that the court does is to quash the decision. By so doing, the court does not grant any consequential relief to the applicant as the court would do in a declaration matter. Quashing a decision may have the consequence of reinstatement. However, no authority is cited that this indirect consequence is a ground for refusal to grant an application for certiorari. Certiorari concerns the supervisory jurisdiction over inferior courts or tribunals. In further support of the contention that the remedy of certiorari ought not to be granted to the applicant, another case was cited. It is the case of *Chief Constable of North Wales v Evans* [1982] 3 All ER 141; [1982] 1 WLR 1155 where a probationary constable, who was found to have been wrongly dismissed, was only granted the declaratory relief. In that case, Evans sought relief under RSC O 53 of England for an order of certiorari to quash the chief constable's decision that he should resign or be discharged; an order of mandamus requiring the chief constable to reinstate him to the office of police constable; and a declaration that the chief constable's decision requiring him to resign or be discharged was illegal, ultra vires and void. The House of Lords granted only the declaratory order sought, and refused the certiorari and mandamus relief. In my view, that case can easily be distinguished because in England as different from the position in Malaysia, an application for a declaration is an application by way of judicial review under RSC O 53. Hence the three remedies sought by Evans in the case. In Malaysia, O 53 of the Rules of the High Court 1980 ('the RHC') does not include an application for a declaration for the purpose of judicial review. An application for a declaration here in this country is proceeded with normally by way of a writ of summons and does not require leave to commence as is required of orders under O 53 of the RHC, and our RHC does not prohibit a litigant from having separate actions under O 53 as well as writ action for a declaratory order. B C D E F G H I

It is also submitted by counsel that since the applicant has his pending action for damages in Suit No KG126 of 1989 and in Suit No KG31 of 1993, he should be left to pursue that remedy instead of

granting him the remedy by certiorari. For the reason stated, I see no merit in this submission. If he succeeds in this application, the decision of the PSC must be quashed pursuant to O 53 of the RHC. In any event, the fact that the applicant has filed the two suits is not relevant to the application for the order of certiorari. This court sitting to hear application for certiorari has no reason to be concerned with the applicant's pending actions against those who wronged him. As stated earlier, in proceedings under O 53 of the RHC, this court can grant only the order of certiorari and not consequential reliefs such as damages or a declaration, in contrast to the English RSC O 53 which allows the applicant for certiorari to claim also other reliefs such as an injunction and declaration. It is, therefore, open to the applicant to pursue other consequential remedies in other actions. Again, it is said that as the applicant's service with the government has been interrupted for some years now since the dismissal, by allowing him to be back in the service, there would be an obvious danger that an undercurrent of ill-feeling would affect his future relations with those in the government whom on record he has taken action against. That is not the concern of the court in granting a certiorari remedy should the applicant succeedsas otherwise, no order at all should be made in the circumstances as so submitted by counsel.

In the circumstances, I am satisfied that the PSC has no jurisdiction to institute the disciplinary proceeding against the applicant resulting in his dismissal based on the purported order of transfer of the State Secretary which was issued without lawful authority. Such being my decision, it is no longer necessary for me to consider the other grounds put forward by the applicant in support of this application as whatever proceedings of the PSC that follow arose out of the ultra vires act of the PSC in commencing the proceedings without jurisdiction. I accordingly order that the decision made by the PSC on 14 December 1988 whereby it was ordered that the applicant be dismissed from the state service as an accounting officer with effect from 1 January 1989 be quashed. The costs of and occasioned by this application of the applicant be borne by the PSC to the credit of the applicant to be taxed unless agreed.

Application allowed.

Reported by Isabel Liong